



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

**CASE OF MITRESKI v. THE FORMER YUGOSLAV REPUBLIC
OF MACEDONIA**

(Application no. 11621/09)

JUDGMENT

STRASBOURG

25 March 2010

FINAL

25/06/2010

*This judgment has become final under Article 44 § 2 of the Convention. It
may be subject to editorial revision.*

In the case of Mitreski v. the former Yugoslav Republic of Macedonia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President*,

Renate Jaeger,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 March 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 11621/09) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Macedonian national, Mr Sime Mitreski (“the applicant”), on 20 February 2009.

2. The applicant was represented by Mr A. Godzo and Mr D. Godzo, lawyers practising in Ohrid. The Macedonian Government (“the Government”) were represented by their Agent, Mrs R. Lazareska Gerovska.

3. The applicant alleged, in particular, that his initial order for house arrest was replaced with an order for detention in prison in proceedings which had not been adversarial and without holding an oral hearing.

4. On 25 May 2009 the President of the Fifth Section decided to communicate the above complaints to the Government and to grant priority to the application under Rule 41 of the Rules of Court. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1982 and lives in Kicevo.

6. At 11.30 a.m. on 12 February 2009 the applicant was arrested and taken into police custody. On 13 February 2009 an investigating judge from the Gostivar Court of First Instance (“the trial court”) questioned the applicant, who was assisted by counsel. An investigation was opened on the grounds of reasonable suspicion of extortion of money from a minor. The investigating judge refused a request by the public prosecutor for the applicant to be detained in prison, but ordered, instead, thirty days' house arrest (*куќен притвор*). That measure required the applicant to remain at home and to refrain from using any means of communication for the duration of the order. His passport was also seized and the police were ordered to check his presence in the house twice a day. The judge considered that there were reasonable grounds for suspecting the applicant of having committed the offence, but that in the light of his clean record and family circumstances, a non-custodial measure, such as house arrest, was preferable. The applicant's house arrest was ordered on all the grounds specified in section 199 of the Criminal Proceedings Act (see paragraph 14 below). This decision was served on the applicant and his lawyer at 5 p.m.

7. At 7 p.m. the same day, the public prosecutor appealed on the ground that the investigating judge had not provided sufficient reasons for refusing to detain the applicant in prison and had not examined whether house arrest could be supervised effectively. The applicant did not appeal.

8. On 14 February 2009 a three-judge panel of the trial court (“the panel”), sitting in private, allowed the appeal and replaced the order for the applicant's house arrest with an order for his detention in prison. It further quashed the order for the confiscation of the applicant's passport. The panel found that there was a danger that the applicant would interfere with the investigation, in particular by putting pressure on witnesses who had not been heard yet and on the victim, who, being a minor, was vulnerable. Having regard to the gravity of the offence and the way in which it had been committed, the panel ruled that house arrest was an inadequate measure in the applicant's case. This decision was served on the applicant at noon. No appeal lay against the panel's decision.

9. On 26 February 2009 the investigating judge terminated the panels' order for the applicant's detention in prison and ordered thirty days' house arrest accompanied by the same security measures described above (see paragraph 6 above). The judge found no justification for the applicant's continued detention in prison since the investigation had been completed. In this connection, he noted that evidence had been taken from the victim and witnesses proposed by both parties. Given the accompanying measures ordered, there was no likelihood of reoffending or obstructing the course of justice by influencing other witnesses, if any.

10. On 27 February 2009 the panel dismissed the public prosecutor's appeal, finding the house arrest and accompanying measures adequate to ensure the applicant's attendance at the trial.

11. The panel, sitting in first instance, extended the applicant's house arrest on two occasions, namely, on 26 March and 24 April 2009, with the

stated aim of ensuring his attendance at trial. In doing so, it relied on the gravity of the charges and potential penalty. The applicant unsuccessfully appealed against both orders. The Gostivar Court of Appeal's decisions dismissing the applicant's appeals dated 23 April and 20 May 2009 respectively.

12. On 21 May 2009 the trial court convicted the applicant of extortion and sentenced him to one and a half years' imprisonment. It further extended the house arrest order until the criminal proceedings are completed. The proceedings are underway.

II. RELEVANT DOMESTIC LAW

13. Section 22(6) of the Criminal Proceedings Act ("the Act") provides that a three-judge panel of the trial court decides, *inter alia*, appeals against decisions of the investigating judge.

14. Under section 199(1), paragraphs 1-3, of the Act, pre-trial detention can be ordered on reasonable suspicion that the person concerned has committed an offence if there is a risk of his or her absconding, interfering with the investigation or reoffending.

15. Under section 200(1), (6) and (8) of the Act, an investigating judge has jurisdiction to order pre-trial detention. The detainee may challenge the detention order before the panel within 24 hours. The appeal does not suspend the execution of the detention order. The panel must decide the appeal within 48 hours. The detainee, through his or her lawyer, can request to be notified of the date of the hearing before the panel in order to be able to present his or her arguments orally.

16. Section 205(2) and (6) of the Act provides that the panel, set up under section 22(6), may extend the period of detention by up to 60 days at the request of the investigating judge. Such an order can be challenged before the next level of jurisdiction.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

17. The applicant complained under Articles 5 and 6 of the Convention that the panel had not given reasons for detaining him in prison and that the latter's decision of 14 February 2009 had been given in private following the public prosecutor's appeal, which had not been communicated to him. He also invoked Article 13 of the Convention. The Court considers that Articles 6 and 13 complaints are in fact a restatement of the complaints under Article 5 of the Convention and should be considered accordingly. This Article, in so far as relevant, reads as follows:

Article 5 §§ 3 and 4

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Admissibility*1. The parties' submissions*

18. The Government submitted that the applicant had not exhausted all effective domestic remedies, although he was represented by a lawyer. In particular, he had not appealed against the investigating judge's decision of 13 February 2009 as had been the case in respect of the decisions of 26 March and 24 April 2009 respectively (see paragraph 11 above). He had also failed to raise his complaints before any domestic authority.

19. The applicant contested the Government's objection as irrelevant for the complaints brought before the Court. He further argued that the panel's decision of 14 February 2009 had been served on him before the time-limit specified in section 200 (6) of the Act had expired. Any appeal after the service would have lacked any prospect of success.

2. The Court's assessment

20. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see, *mutatis mutandis*, *Merger and Cros v. France* (dec.), no. 68864/01, 11 March 2004; *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, ECHR 1996-VI; and *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, ECHR 1996-IV).

21. The Court emphasises that the application of the exhaustion rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights and that it must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable

of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *Jasar v. the former Yugoslav Republic of Macedonia* (dec.), no. 69908/01, 19 January and 11 April 2006).

22. As regards the present case, the Court notes that the investigating judge initially placed the applicant under house arrest. Following the public prosecutor's appeal, the panel quashed that order and replaced it with the order for detention in prison. The applicant did not appeal against the decision of the investigating judge, although he was entitled to do so under section 200 (6) of the Act. However, that appeal would have been effective only in respect of the investigating judge's decision as evidenced from the public prosecutor's appeal, which led to the quashing of the decision of 13 February 2009. It would not have any bearing on the alleged violations in the proceedings before the panel. In such circumstances, the Court considers that the Government's objection must be rejected.

23. As to the applicant's complaint that the panel's decision of 14 February 2009 was not reasoned, the Court notes that it was given on reasonable suspicion that the applicant had extorted money from a minor. It was based on the panel's finding that the applicant might obstruct the course of justice by putting pressure, in particular, on the victim, taking into account that he was a minor. The absence of evidence from other proposed witnesses was also taken into consideration when finding house arrest to be an inadequate measure at that time.

24. In such circumstances, the Court finds that the panel's decision of 14 February 2009 replacing the initial order for house arrest was sufficiently reasoned. The Court notes that after the investigation had been completed and proposed evidence collected, this order was replaced with a fresh order for house arrest. The applicant remained in prison for 12 days, instead of 30 days as ordered by the panel. It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

25. As regards the remaining complaints in respect of the panel's decision of 14 February 2009, the Court finds that they are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

26. The applicant reiterated his complaints that the proceedings before the panel had violated the principle of the equality of arms because the public prosecutor's appeal had not been served on him. As a result, he could not have requested the panel to notify him of the date of the hearing.

27. The Government submitted that the impugned proceedings had been in compliance with Article 5 of the Convention. They conceded, however, that the public prosecutor's appeal of 13 February 2009 was not communicated to the applicant.

28. They further argued that the applicant had not requested to be notified of the date of the hearing before the panel, as specified in section 200 (8) of the Act. This latter provision had not imposed a duty on the panel to notify the interested parties, but rather stipulated that they had a right to make such a request.

2. The Court's consideration

29. The present case concerns proceedings in which the appeal panel of the Gostivar Court of First Instance reviewed the lawfulness of the applicant's initial house arrest ordered by the investigating judge on 13 February 2009. The applicant's complaints therefore fall to be examined under Article 5 § 4 of the Convention, which requires, in respect of a person detained under Article 5 § 1 (c), as in the present case, adversarial proceedings and a hearing (see *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-XII). It further reiterates that in proceedings in which an appeal against detention order is being examined, "equality of arms" between the parties, the prosecutor and the detained person must be ensured (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 59, ECHR 1999-II and *Niedbala v. Poland*, no. 27915/95, § 66, 4 July 2000).

30. The Court notes that the public prosecutor filed an appeal against the decision of the investigating judge of 13 February 2009 to place the applicant under house arrest. The panel, sitting in second instance, quashed the impugned decision and replaced it with the order for detention in prison. The appeal, as conceded by the Government, was not served on the applicant. The Court considers that that procedural failure prevented him from effectively participating in the proceedings before the panel.

31. Furthermore, the panel decided at a hearing held in private. Since the applicant was heard by the investigating judge (see paragraph 6 above), there would be no need, in principle, for his repeated examination at second instance. However, the Court notes that the panel replaced the initial house arrest, as a more lenient security measure, with the detention in prison. That decision entailed a change in the nature of the place of detention, from a private home to a public institution, as well as a substantial change in the

conditions of detention. In such circumstances, the Court considers that the panel's decision of 14 February 2009 is to be regarded as a fresh detention order, different from the initial house arrest, which required the applicant to be given an opportunity to present his arguments orally before the panel (see, *mutatis mutandis*, *Mancini v. Italy*, no. 44955/98, §§ 19 and 20, ECHR 2001-IX). Being unaware of the public prosecutor's appeal, the applicant was unable to avail himself of the right provided for in section 200 (8) of the Act.

32. Consequently, there has been a violation of Article 5 § 4 of the Convention on both grounds.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

34. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

35. The Government contested this claim as unsubstantiated.

36. The Court reiterates that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the guarantees of Article 5 § 4 of the Convention. In the present case, the Court cannot speculate as to whether the applicant would have been detained in prison had the procedural guarantees of Article 5 § 4 been respected in his case. Consequently, the Court considers that the non-pecuniary damage is adequately compensated by the finding of a violation of this latter provision (see *Nikolova*, § 76 and *Niedbala*, §§ 88 and 89, cited above).

B. Costs and expenses

37. The applicant also claimed EUR 900 for the costs and expenses incurred before the Court. He provided an itemised list of costs based on the scale rates of the Macedonian Bar.

38. The Government contested this claim.

39. Regard being had to the documents in its possession, the Court considers it reasonable to award the sum of EUR 765 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

40. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the alleged violation of the principle of equality of arms and the absence of an oral hearing before the panel admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 4 of the Convention in respect of the principle of equality of arms and the absence of an oral hearing before the appeal panel;
3. *Holds* that the finding of a violation of Article 5 § 4 in itself constitutes sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 765 (seven hundred and sixty five euros) in respect of costs and expenses, plus any tax that may be chargeable on him, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President